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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 DAVID FOGLE,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of
Social Security,

15 Defendant.
16

CASE NO. C08-5395RBL-KLS

REPORT AND
RECOMMENDATION

Noted for May 15, 2009

17 Plaintiff, David Fogle, has brought this matter for judicial review of the denial of his applications
18 for disability insurance and supplemental security income ("SSI") benefits. This matter has been referred
19 to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR 4(a)(4) and
20 as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the
21 parties' briefs and the remaining record, the undersigned submits the following Report and
22 Recommendation for the Court's review.

23 FACTUAL AND PROCEDURAL HISTORY

24 Plaintiff currently is 45 years old.¹ Tr. 45. He has a high school education and past work
25 experience as a building maintenance worker, kitchen helper and construction worker. Tr. 404, 469-70.

26 Plaintiff filed an application for disability insurance and one for SSI benefits on January 23, 2004,
27

28 ¹Plaintiff's date of birth has been redacted in accordance with the General Order of the Court regarding Public Access to
Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 and February 14, 2007, respectively, alleging disability as of December 31, 2000, due to back and foot
2 problems and a schizoid-type personality disorder. Tr. 17, 54-56, 396-97. His applications were denied
3 initially and on reconsideration. Tr. 17, 45-46, 48, 51.

4 A hearing was held before an administrative law judge (“ALJ”) on January 23, 2007, at which
5 plaintiff, represented by counsel, appeared and testified. Tr. 392-422. Plaintiff’s mother also appeared at
6 the hearing, and began to testify, but, as discussed in greater detail below, was unable to complete her
7 testimony at the time, because the ALJ continued the hearing to allow for further development of the
8 documentary record. Tr. 416-22. A vocational expert appeared at the hearing as well, but because the
9 hearing was continued, did not testify. Tr. 392-422.

10 On August 15, 2007, another hearing was held before a second ALJ, at which plaintiff, represented
11 by counsel, again appeared and testified, as did a different vocational expert. Tr. 423-81. Following this
12 hearing, plaintiff amended his alleged onset date of disability to October 2002. Tr. 17, 178. On August 29,
13 2007, the second ALJ issued a decision, determining plaintiff to be not disabled, finding specifically in
14 relevant part:

- 15 (1) at step one of the sequential disability evaluation process,² plaintiff had not
16 engaged in substantial gainful activity since his alleged amended onset date of
disability;
- 17 (2) at step two, plaintiff had “severe” impairments consisting of low back strain,
18 obesity, schizoid personality disorder traits, and rule-out learning disorder;
- 19 (3) at step three, none of plaintiff’s impairments met or equaled the criteria of any
of those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1;
- 20 (4) after step three but before step four, plaintiff had the residual functional
21 capacity to perform light work, with certain additional non-exertional
limitations;
- 22 (5) at step four, plaintiff was unable to perform his past relevant work; and
- 23 (6) at step five, plaintiff was capable of performing other jobs existing in significant
24 numbers in the national economy.

25 Tr. 17-27. Plaintiff’s request for review was denied by the Appeals Council on May 30, 2008, making the
26 ALJ’s decision the Commissioner’s final decision. Tr. 5; 20 C.F.R. § 404.981, § 416.1481.

27
28 ²The Commissioner employs a five-step “sequential evaluation process” to determine whether a claimant is disabled. See
20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step, the disability
determination is made at that step, and the sequential evaluation process ends. Id.

1 On June 23, 2008, plaintiff filed a complaint in this Court seeking review of the second ALJ's
2 decision. (Dkt. #1-#3). The administrative record was filed with the Court on October 8, 2008. (Dkt. #11).
3 Plaintiff argues the ALJ's decision should be reversed and remanded to the Commissioner for further
4 administrative proceedings for the following reasons:

- 5 (a) the ALJ erred in evaluating the medical evidence in the record;
- 6 (b) the ALJ erred in failing to determine the severity of plaintiff's syncopal
7 episodes and light-headedness;
- 8 (c) the ALJ erred in assessing plaintiff's credibility;
- 9 (d) plaintiff's mother was improperly prevented from testifying at the first hearing;
- 10 (e) the ALJ erred in assessing plaintiff's residual functional capacity; and
- 11 (f) the ALJ improperly disregarded vocational expert testimony.

12 For the reasons set forth below, the undersigned does not agree the ALJ erred in determining plaintiff to be
13 not disabled, and therefore recommends the ALJ's decision be affirmed.

14 DISCUSSION

15 This Court must uphold the Commissioner's determination that plaintiff is not disabled if the
16 Commissioner applied the proper legal standard and there is substantial evidence in the record as a whole
17 to support the decision. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is
18 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson
19 v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than
20 a scintilla but less than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir.
21 1975); Carr v. Sullivan, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than
22 one rational interpretation, the Court must uphold the Commissioner's decision. Allen v. Heckler, 749
23 F.2d 577, 579 (9th Cir. 1984).

24 I. The ALJ Properly Evaluated the Medical Evidence in the Record

25 The ALJ is responsible for determining credibility and resolving ambiguities and conflicts in the
26 medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). Where the medical evidence in
27 the record is not conclusive, "questions of credibility and resolution of conflicts" are solely the functions
28 of the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion
must be upheld." Morgan v. Commissioner of the Social Security Administration, 169 F.3d 595, 601 (9th

1 Cir. 1999). Determining whether inconsistencies in the medical evidence “are material (or are in fact
2 inconsistencies at all) and whether certain factors are relevant to discount” the opinions of medical experts
3 “falls within this responsibility.” Id. at 603.

4 In resolving questions of credibility and conflicts in the evidence, an ALJ’s findings “must be
5 supported by specific, cogent reasons.” Reddick, 157 F.3d at 725. The ALJ can do this “by setting out a
6 detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation
7 thereof, and making findings.” Id. The ALJ also may draw inferences “logically flowing from the
8 evidence.” Sample, 694 F.2d at 642. Further, the Court itself may draw “specific and legitimate inferences
9 from the ALJ’s opinion.” Magallanes v. Bowen, 881 F.2d 747, 755, (9th Cir. 1989).

10 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of
11 either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). Even when a
12 treating or examining physician’s opinion is contradicted, that opinion “can only be rejected for specific
13 and legitimate reasons that are supported by substantial evidence in the record.” Id. at 830-31. However,
14 the ALJ “need not discuss *all* evidence presented” to him or her. Vincent on Behalf of Vincent v. Heckler,
15 739 F.3d 1393, 1394-95 (9th Cir. 1984) (citation omitted) (emphasis in original). The ALJ must only
16 explain why “significant probative evidence has been rejected.” Id.; see also Cotter v. Harris, 642 F.2d
17 700, 706-07 (3rd Cir. 1981); Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

18 In general, more weight is given to a treating physician’s opinion than to the opinions of those who
19 do not treat the claimant. Lester, 81 F.3d at 830. On the other hand, an ALJ need not accept the opinion of
20 a treating physician, “if that opinion is brief, conclusory, and inadequately supported by clinical findings”
21 or “by the record as a whole.” Batson v. Commissioner of Social Security Administration, 359 F.3d 1190,
22 1195 (9th Cir. 2004); Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242
23 F.3d 1144, 1149 (9th Cir. 2001). An examining physician’s opinion is “entitled to greater weight than the
24 opinion of a nonexamining physician.” Lester, 81 F.3d at 830-31. A non-examining physician’s opinion
25 may constitute substantial evidence if “it is consistent with other independent evidence in the record.” Id.
26 at 830-31; Tonapetyan, 242 F.3d at 1149.

27 A. Dr. Bhaskar

28 Plaintiff was examined by Padmini Bhaskar, M.D., in late March 2004, who diagnosed him with

1 right ankle pain and swelling and low back pain, due or secondary to “occupational hazards.” Tr. 296. Dr.

2 Bhaskar also provided the following functional assessment:

3 . . . The number of hours that the claimant could be expected to stand and walk in an
4 eight-hour workday is approximately four hours, but if he has to, he needs to sit down
and rest.

5 The number of hours that the claimant could be expected to sit is without limitation.
6 Some limitation could be present because of the low back pain, which he has developed
secondary to his leg pain.

7 It is not necessary for him to use any assistive device at present.

8 There is no limitation to the amount of weight that the claimant could lift and carry
9 frequently or occasionally.

10 There are some postural limitations noted on bending, stooping, and crouching
occasionally, but not frequently. The limitation could be due to his low back pain,
11 which he has developed as a consequence of prolonged standing at his work washing
dishes for many hours while standing.

12 There are no manipulative limitations noted on handling, feeling, grasping, and
13 fingering at present, but there is some discomfort on his right wrist on movement,
which would need to be investigated.

14 There are no relevant visual or communicative limitations noted.

15 The only workplace environmental limitation could be due to the swelling and pain of
16 his ankles because of prolonged standing, which needs to be investigated and treated, as
well as his low back pain. Some amount of depression can also cause some limitation
17 in his work.

18 Tr. 296-97.

19 With respect to Dr. Bhaskar’s functional assessment, the ALJ found in relevant part as follows:

20 . . . The March 2004 assessment by Dr. Bhaskar finding no limitations in the claimant’s
capacity for lifting and carrying is . . . not entirely credited because subsequent medical
21 records (and the claimant’s credible testimony) corroborate significant weight
limitations on his work capacity (See Ex. 5F). However, Dr. Bhaskar’s assessment that
22 the claimant can only stand and walk a total of 4 hours per 8-hour day is not adopted
because it is not supported by individual reports in the record, the claimant’s stated
23 wide ranging daily activities, his lack of medical treatment, or the record as a whole as
summarized herein. Indeed, as noted above the claimant himself has consistently
24 maintained that he is not disabled and is, in fact, able to perform a wide range of work.
In short, the evidence presented here demonstrates that the claimant remains capable of
performing a wide range of light exertional work activity. . .

25 Tr. 25. Plaintiff challenges the ALJ’s statement that Dr. Bhaskar’s limitation on standing and walking is
26 not supported by the evidence in the record as a whole, arguing that the opposite is true. The undersigned
27 disagrees.
28

In support of his challenge, plaintiff points to treatment notes from a registered nurse, Margene

1 Fields, A.R.N.P., in which she commented that he was experiencing swelling and pain in his right leg and
2 ankle, and that the pain affected his ability to stand for prolonged periods at work. Those notes, however,
3 do not provide the support plaintiff asserts they do. Plaintiff did complain of pain in his right leg in early
4 April 2004, and Ms. Fields did note pain with palpation at the time, and diagnosed him with right ankle
5 “[p]ain/sprain”. Tr. 333. Neither plaintiff nor Ms. Fields, though, stated that the pain interfered with his
6 ability to perform his job. Indeed, plaintiff reported that he stood “on his feet for many hrs – 9-10 a day
7 for 3 days/wk” as a dishwasher. Id. No work-related limitations, furthermore, were assessed.

8 In mid-May 2004, plaintiff again presented with complaints of pain in his right ankle due to having
9 hyperflexed his right foot when riding his bicycle five days previously. Id. The fact that plaintiff was able
10 to ride his bicycle, and apparently only returned to see Ms. Fields because he newly injured his right ankle,
11 indicates the prior pain and swelling he experienced does not support the standing and walking limitations
12 noted above found by Dr. Bhaskar. See Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (claimant
13 must show he or she suffers from medically determinable impairment that can be expected to result in
14 death or that has lasted or can be expected to last for continuous period of not less than twelve months).
15 This is supported by the fact that Ms. Fields found only “minimal” swelling and pain upon examination of
16 plaintiff’s right ankle. Id.

17 Plaintiff again saw Ms. Fields in late July 2004, with complaints of pain and swelling in his right
18 ankle. Tr. 299. Interestingly, Ms. Fields noted that while she had given plaintiff “an x-ray slip” when she
19 saw him in mid-May 2004, he “decided not to do this.” Id. In fact, he reported that the “pain and swelling
20 at that point did resolve.” Id. At his late July 2004 visit, furthermore, plaintiff once more told Ms. Fields
21 that he stood “on his feet a lot w/doing dishes at the restaurant,” and was complaining of experiencing pain
22 for only the past day. Id. He was found to have good range of motion of his ankle without any pain, with
23 the only remarkable finding being that he was “very flat-footed.” Id. Although Ms. Fields diagnosed him
24 with “[s]prain vs. gout,” and stated that he was “off work x 3 days,” this evidence too establishes
25 plaintiff’s alleged right ankle pain and swelling did not significantly affect his ability to work for the
26 period of time required to establish disability.

27 Plaintiff also points to a treatment note from Ms. Fields, dated January 26, 2006, in which plaintiff
28 complained of pain “shooting down” his right leg, and that it was “very painful” when he walked around.

1 Tr. 332. The only significant finding Ms. Fields could find on physical examination, though, was pain
2 with deep palpation of his right gluteal maximus. Id. Otherwise, clinical findings were unremarkable. Id.
3 Ms. Fields did diagnose plaintiff with “[p]ain/strain lumbar spine w/sciatica,” but she imposed no work-
4 related limitations on him. Id. It is true that plaintiff was fitted for orthotics in late April 2006. Tr. 335.
5 This fact alone, however, does not at all indicate that he was significantly limited in his ability to stand
6 and/or walk. Indeed, at the second hearing, plaintiff testified that his ankle problem was “healed”, and that
7 he wore his orthotics to correct his “walking situation.” Tr. 453.

8 Lastly, in terms of medical evidence, plaintiff points to progress notes concerning his chiropractic
9 treatment, which took place between early October 2006, and late January 2007, and which plaintiff states
10 show the presence of back and right hip pain. Again, while true (Tr. 338-70), the existence of pain alone
11 does not establish significant work-related limitations, let alone disability. See Matthews v. Shalala, 10
12 F.3d 678, 680 (9th Cir. 1993) (mere existence of impairment is insufficient proof of disability). Further,
13 while it is also true that those progress notes show plaintiff did report during the month of October 2006,
14 that standing and walking aggravated his pain, neither he nor his treatment provider actually stated that his
15 ability to stand and/or walk were limited thereby. Tr. 360-70. In addition, the record shows plaintiff’s pain
16 lessened considerably during the course of his treatment, resulting in a reported “80% improvement” in his
17 symptoms by early January 2007. See Tr. 338-60.

18 Plaintiff also incorrectly asserts the ALJ was wrong in finding that his activities of daily living did
19 not support the standing and walking limitation found by Dr. Bhaskar. Plaintiff relies on the statements he
20 made in a daily activities questionnaire he completed (see Tr. 71-74) and some of the testimony he gave at
21 the first hearing (see Tr. 411-12) as support for that assertion. The substantial evidence in the record,
22 however, supports the ALJ’s findings on this issue. For example, in early January 2001, though
23 admittedly prior to his alleged amended onset date of disability, plaintiff reported being “very active at his
24 work and . . . able to carry out both his work activities and activities of daily living.” Tr. 285. He reported
25 in early February 2001, working as a “janitor/gardener/security guard” and maintenance worker. Tr. 223,
26 225. In neither case did plaintiff indicate any problems with standing and/or walking. So too did plaintiff
27 report working as a handyman without such problems in late September 2001. Tr. 281.

28 In late March 2004, plaintiff reported that he worked as a dishwasher, pedaled his bicycle to work,
and had “to stand a long time to do the dishes,” more specifically “almost seven hours a day.” Tr. 289,

1 292-93. As noted previously, plaintiff also reported in early April 2004, standing on his feet “for many hrs
2 – 9-10 a day for 3 days/wk” as a dishwasher, and in late July 2004, standing “on his feet a lot w/doing
3 dishes at the restaurant.” Tr. 332-33. In early March 2007, plaintiff stated that he was able work “[n]o
4 problem,” except for “some anger problems,” and that most recently he had worked digging ditches for
5 three days in September 2006. Tr. 383. Indeed, he reported having performed “lots of temporary jobs,”
6 mostly of the “heavy industrial” variety with “no difficulties at all.” Id.

7 As for plaintiff’s testimony, at the hearing, he testified that he did not really have any physical
8 limitations that made shopping painful for him or limited him in any way. Tr. 442. He also testified at the
9 time that in terms of yard work, he mowed and trimmed the lawn, and even got “a little carried away with”
10 pruning. Tr. 446. Performance of these activities generally require the ability to stand and/or walk. Most
11 significantly, plaintiff testified that he probably could stand and walk “about six hours” with normal breaks
12 during a workday. Tr. 448. Clearly, that is greater than the ability to stand and walk for approximately
13 four hours in a workday as opined by Dr. Bhaskar. Indeed, plaintiff further testified that as long as he
14 wore his orthotics, he had no problems with these activities. Tr. 448-49. Lastly, he testified that he left his
15 job as a dishwasher not because of any problems standing for so long, but because he got angry at a co-
16 worker and was fired for that incident. Tr. 462-64.

17 Plaintiff makes much of the fact that the ALJ found him to be generally credible. But, as discussed
18 above, that finding of credibility is not inconsistent with the ALJ’s determination that his activities of daily
19 living did not support the standing and walking limitation opined by Dr. Bhaskar. That is, plaintiff’s own
20 testimony and self-reports belie that opined limitation. Other objective medical evidence in the record,
21 furthermore, supports the ALJ’s determination here. In late September 2004, for example, Alnoor Virji,
22 M.D., a non-examining consulting physician, opined that plaintiff was capable of standing and/or walking
23 for about six hours in an eight-hour workday. Tr. 317.

24 Although plaintiff is correct that generally the opinion of an examining physician is given greater
25 weight than that of a non-examining physician, the latter’s opinion may constitute substantial evidence if it
26 is consistent with other independent evidence in the record, as it is here for the reasons discussed above.
27 See Lester, 81 F.3d at 830-31; Tonapetyan, 242 F.3d at 1149. Plaintiff asserts the ALJ’s reliance on Dr.
28 Virji’s report in rejecting the limitations Dr. Bhaskar placed on his ability to stand and walk should be

1 deemed inadequate, because the ALJ failed to indicate what portion of that report was accorded significant
2 weight and did not discuss that report in formulating his assessment of plaintiff's residual functional
3 capacity ("RFC"). See Tr. 25. But that report specifically was noted in the section of the ALJ's opinion
4 discussing the evidence supporting the RFC assessment. See Tr. 23-25. Dr. Virji's report, furthermore,
5 found plaintiff to be capable of standing and/or walking at the light exertional level of work, which clearly
6 is consistent with the ALJ's own RFC assessment.³

7 B. Dr. Bremer

8 In early March 2007, plaintiff was evaluated by Jeff Bremer, Ph.D., who diagnosed him with an
9 asperger's disorder, a reading disorder, a mathematics disorder, a disorder of written expression, and a
10 global assessment of functioning ("GAF") score of 60, both current and the highest in the past year. Tr.
11 387. Dr. Bremer further opined in relevant part that:

12 Mr. Fogle would, almost certainly, be seen as a bit "odd" or "off" in social situations –
13 interacting with the public, coworkers, classmates, or supervisors, for example. He has,
14 by history, consistently under performed in social role expectations and performance,
15 as a result, as it pertains to relationships, friends, and jobs.

16 Mr. Fogle presents with a qualitative impairment in social interaction, including
17 impairment in the use of non-verbal behaviors, to develop peer relationships
18 appropriate to his age and developmental level, and the degree of social and emotional
19 reciprocity. He also has some unusual, though not necessarily stereotype, interests and
20 activities – attending AA meetings even though he is not an alcoholic and carving
21 crucifixes, for example. His social interactions are decidedly inconsistent with his
22 general level of intellectual functioning and verbal communication skills.

23 Mr. Fogle is severely Learning Disabled in Reading, Writing, and Arithmetic. It is not
24 surprising, in this light, that he has found himself in primarily industrial laboring
25 positions. He would almost certainly not do well in format or extended classroom
26 training, both for social and learning disability issues. I believe, nonetheless, that he
27 could manage his own finance . . .

28 Id. The ALJ evaluated Dr. Bremer's opinion as follows:

. . . After examining the claimant, Dr. Bremer's primary diagnosis was of Asperger's
Disorder under Axis I of his clinical evaluation; this primary diagnosis was coupled
with specific disorders as to Reading, Mathematics and Written Expression identified
further with specific diagnostic codes. In the body of his evaluation, Dr. Bremer
reaffirmed the claimant's significant academic limitations and also opines the claimant

³Plaintiff also argues in his reply brief that the ALJ failed to consider the late April 2006 opinion of Terrence Hess, D.P.M., that he had a "[p]osterior tibial tendon partial tearing, right side," which he asserts supports the standing and walking limitation found by Dr. Bhaskar. Tr. 335. Because plaintiff did not raise this issue in his opening brief, however, it should not be considered here. Nevertheless, the undersigned does note that even if plaintiff had properly raised that issue, it would have been found to have been without merit, since, as discussed above, the mere existence of a medical impairment and related pain symptoms alone is not sufficient to establish disability, without at least some evidence of actual work-related functional limitations.

1 has significant social impairment. The doctor does not specifically attribute these “odd
2 social behaviors” directly to his finding of Asperger’s disorder but same may be
3 implied from the specific context in his DISCUSSION and in the report as a whole.
4 However, as noted above despite the claimant’s odd social behaviors, he has stated that
5 he loves to be around some people, attends regular 12-step meetings twice a week and
6 attends church, has at least one friend, and has generally interacted appropriately during
the various consultative examinations and during both of his administrative hearings in
this matter. Notwithstanding the primary diagnosis of Asperger’s, the Court so finds,
after weighing the totality of the evidence and assessing the claimant in person during
the hearing, the claimant is no more than mildly impaired in social functioning.

7 Tr. 25.

8 Plaintiff argues that although the ALJ mentions Dr. Bremer’s report and opinion in his decision, he
9 never discusses the weight he gave. Clearly, though, this is not the case, as the ALJ expressly stated what
10 weight he gave to Dr. Bremer’s opinion regarding plaintiff’s social functioning. Plaintiff further argues in
11 his opening brief that the ALJ failed to state whether he considered any ambiguities or inconsistencies
12 between Dr. Bremer’s opinion and the opinions of Jacquelyn Ball, M.D., and Scott Alvord, Psy.D., two
13 other non-examining medical sources in the record. See (Dkt. #12, p. 11). But plaintiff does not state what
14 ambiguities or inconsistencies the ALJ was required to consider, but failed to do so. Indeed, shortly
15 thereafter in his opening brief, plaintiff asserts these three opinions are entirely consistent concerning his
16 social functioning. See (Id. at p. 12).

17 Plaintiff also argues the ALJ erred in stating that Dr. Bremer concluded he was malingering, when
18 it actually was Dr. Alvord who opined as to this based on the psychological testing he conducted. See Tr.
19 378. However, the undersigned finds this error to be harmless. See Stout v. Commissioner, Social Security
20 Admin., 454 F.3d 1050, 1055 (9th Cir. 2006) (error harmless where it is non-prejudicial to claimant or
21 irrelevant to ALJ’s ultimate disability conclusion). Plaintiff disagrees that this error was harmless, arguing
22 it is unclear whether the ALJ’s statement colored his opinion regarding Dr. Bremer’s findings and opinion.
23 The ALJ, though, gave no indication in the section of his decision where he set forth his actual analysis of
24 Dr. Bremer’s report that he relied at all on the issue of malingering. In addition, the ALJ did correctly note
25 earlier in his decision that it was Dr. Alvord who found evidence of malingering. See Tr. 21. Accordingly,
26 plaintiff has failed to show the subsequent erroneous reference thereto was prejudicial.

27 The undersigned, furthermore, agrees with the ALJ that the substantial evidence in the record does
28 support a finding of mild impairment for the most part in the area of social functioning. For example, in
response to a question from Dr. Ball in late March 2004, as to whether he experienced anxiety when he

1 was around other people, plaintiff responded as follows:

2 . . . “They (family) say I have an anxiety disorder. The only reason I have anxiety
3 would depend on what’s going on in the day. I’m not a loner. Some people I like,
4 some I don’t.” The claimant reports that intermittently he will feel anger. He states,
“I’ll go somewhere and think oh no, this won’t work out, but then it does, it works out
fine. Anxiety does not keep me at home.”

5 Tr. 287. While plaintiff reported that he preferred “a lot of solitary activities” and did “not have a lot of
6 close friends,” he had “many acquaintances” and did “not feel uncomfortable when he” was “around other
7 people.” Id. Plaintiff further reported that he liked conversing with people whom he met for the first time,
8 but that he got “nervous about what to say” when he first starts talking to people whom he knows and had
9 not seen for awhile. Tr. 287-88. Dr. Ball further noted that plaintiff “interacted appropriately” both with
10 himself and with staff, which he felt suggested an ability to do so with others, i.e., supervisors, co-workers
11 and the public, in the workplace. Tr. 291.

12 In early March 2007, plaintiff told Dr. Bremer he went to Alcoholics Anonymous (“AA”) meetings
13 two days a week “just to be around people,” and liked “to be friendly” and “wave to people.” Tr. 383-84.
14 This despite being described by Dr. Bremer as presenting “as quite ‘odd’ and socially ‘off,’” although he
15 was “not entirely ineffective socially.” Tr. 384. Plaintiff also told Dr. Bremer that he was going to travel
16 to California in a couple of weeks to visit some friends of his. Id. In late March 2007, while Dr. Alvord
17 stated plaintiff presented “as somewhat socially inept, isolated, and lacking a strong desire for intimacy,”
18 he nevertheless believed plaintiff was “able to function adaptively in society.” Tr. 379. Plaintiff himself
19 reported having “friends associated with his church.” Tr. 375.

20 At the first hearing, furthermore, plaintiff, as he earlier had reported to Dr. Bremer, testified that he
21 went to AA meetings because he liked “being around other people.” Tr. 408. Plaintiff also testified that he
22 talked to five to ten people from his AA meetings on the telephone each day, and that he also meets with
23 them face to face at his church. Tr. 408-09. While plaintiff further testified at that hearing that he got
24 “angry a lot” when other people made fun of him or told him to speed up while working, and that he lost at
25 least some jobs because of his anger, he testified as well at the time that he tried and did at times get along
26 with other people. Tr. 413, 416.

27 In addition, at the second hearing, when asked if he was shy, plaintiff testified he did not know
28 what the definition of that word meant, thereby indicating he was not shy at all. Tr. 453. Plaintiff also

1 testified that once more not only did he got to AA meetings to be “around other people,” he even had lead
2 such meetings twice a week over a period of three months. Tr. 454-56. He testified that he got along with
3 his neighbors as well. Tr. 461. Accordingly, while plaintiff has alleged he has anger issues, which he
4 asserts has interfered with his ability to get along with others and maintain employment, the substantial
5 evidence in the record shows he enjoys being around other people, and indeed actively seeks opportunities
6 to do so. As such, the ALJ did not err in discounting Dr. Bremer’s opinion on this basis.

7 II. The ALJ’s Step Two Findings

8 At step two of the sequential disability evaluation process, the ALJ must determine if an
9 impairment is “severe.” Id. An impairment is “not severe” if it does not “significantly limit” a claimant’s
10 mental or physical abilities to do basic work activities. 20 C.F.R. § 404.1520(a)(4)(iii), (c), §
11 416.920(a)(4)(iii), (c); Social Security Ruling (“SSR”) 96-3p, 1996 WL 374181 *1. Basic work activities
12 are those “abilities and aptitudes necessary to do most jobs.” 20 C.F.R. § 404.1521(b), § 416.921(b); SSR
13 85- 28, 1985 WL 56856 *3.

14 An impairment is not severe only if the evidence establishes a slight abnormality that has “no more
15 than a minimal effect on an individual[’]s ability to work.” See SSR 85-28, 1985 WL 56856 *3; Smolen v.
16 Chater, 80 F.3d 1273, 1290 (9th Cir. 1996); Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir.1988). Plaintiff
17 has the burden of proving that his “impairments or their symptoms affect [his] ability to perform basic
18 work activities.” Edlund v. Massanari, 253 F.3d 1152, 1159-60 (9th Cir. 2001); Tidwell v. Apfel, 161 F.3d
19 599, 601 (9th Cir. 1998). The step two inquiry described above, however, is a *de minimis* screening device
20 used to dispose of groundless claims. Smolen, 80 F.3d at 1290.

21 As noted above, the ALJ found plaintiff had low back strain, obesity, schizoid personality disorder
22 traits, and rule-out learning disorder, which he found to be severe. Tr. 20. Plaintiff argues the ALJ erred in
23 not also finding his syncopal episodes and light-headedness to be severe. Specifically, plaintiff argues he
24 testified at the second hearing that he had experienced an episode of light-headedness a couple of months
25 prior to that hearing (Tr. 458), and there is no indication in the record that his light-headedness or syncopal
26 episodes had resolved by then. Plaintiff asserts the ALJ thus erred in failing to fully develop the record by
27 not questioning him further regarding the frequency and duration of his dizzy spells, and in not considering
28 the impact they had on his ability to work. The undersigned disagrees.

1 Plaintiff appears to equate the existence of an impairment with the presence of significant work-
2 related limitations, of which the record in this case contains no real evidence. See Matthews, 10 F.3d at
3 680. First, that plaintiff may have received treatment for a seizure disorder for a period occurring many
4 years prior to his alleged onset date of disability is irrelevant to the consideration of impairment severity
5 here, even if there is a connection – which plaintiff has not made – between that disorder and the alleged
6 syncopal or dizzy episodes. Plaintiff does not point to, nor does there appear to be any, evidence in the
7 record that such a disorder is more than remotely present for him, let alone has, or at any time in the past
8 has had, any effect on his ability to work. Indeed, in early March 2007, plaintiff told Dr. Bremer that he
9 had “not had any seizures” or taken any medication therefor as an adult. Tr. 382.

10 The record, though it does contain some evidence of syncopal or lightheadedness episodes, clearly
11 shows the frequency and duration thereof to be hardly significant. For example, in early February 2001, it
12 was reported that while plaintiff was “[p]ositive for a history of ‘passing out’ easily,” no such episodes had
13 occurred recently. Tr. 223. Although plaintiff was diagnosed as having experienced a syncopal episode in
14 late January 2006, it was noted that while he reported having similar episodes in the past, the last time one
15 had occurred was in 2000, when he suffered from only two of them. Tr. 322. Indeed, neurological findings
16 obtained at the time were “unremarkable”, and plaintiff was observed to be “feeling very well the next
17 day.” Tr. 322, 327-28. In mid-March 2006, plaintiff reported that “[h]is recurrent light-headedness” had
18 “resolved since he started using decaf.” Tr. 330.

19 At the first hearing, furthermore, plaintiff indicated his syncopal episodes or lightheadedness were
20 not medical impairments. Tr. 410-11. It is true that at the second hearing plaintiff testified that “several
21 months ago” he “was feeling kind of dizzy,” and his mother told him to sit down. Tr. 458. As noted above,
22 plaintiff argues this testimony should have resulted in the ALJ further developing the record regarding this
23 alleged impairment. The duty to further develop the record, though, is triggered only when the evidence is
24 ambiguous, or when it is inadequate to allow for the proper evaluation thereof. Mayes v. Massanari, 276
25 F.3d 453, 459 (9th Cir. 2001). Such is not the case here. The evidence in the record establishes plaintiff
26 has had only some four episodes spaced several years apart since late January 2001. Nor does the
27 evidence indicate such episodes – other than for perhaps a day or two – have affected his work-related
28 functioning. The undersigned thus rejects the assertion that the ALJ should have considered this alleged

1 impairment or any claimed limitations stemming therefrom in determining plaintiff's ability to work.

2 III. The ALJ's Assessment of Plaintiff's Credibility

3 Questions of credibility are solely within the control of the ALJ. Sample v. Schweiker, 694 F.2d
4 639, 642 (9th Cir. 1982). The Court should not "second-guess" this credibility determination. Allen, 749
5 F.2d at 580. In addition, the Court may not reverse a credibility determination where that determination is
6 based on contradictory or ambiguous evidence. Id. at 579. That some of the reasons for discrediting a
7 claimant's testimony should properly be discounted does not render the ALJ's determination invalid, as
8 long as that determination is supported by substantial evidence. Tonapetyan v. Halter, 242 F.3d 1144, 1148
9 (9th Cir. 2001).

10 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent reasons for
11 the disbelief." Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted). The ALJ "must
12 identify what testimony is not credible and what evidence undermines the claimant's complaints." Id.;
13 Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the claimant is
14 malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing."
15 Lester, 81 F.2d at 834. The evidence as a whole must support a finding of malingering. O'Donnell v.
16 Barnhart, 318 F.3d 811, 818 (8th Cir. 2003).

17 In determining a claimant's credibility, the ALJ may consider "ordinary techniques of credibility
18 evaluation," such as reputation for lying, prior inconsistent statements concerning symptoms, and other
19 testimony that "appears less than candid." Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996). The ALJ
20 also may consider a claimant's work record and observations of physicians and other third parties
21 regarding the nature, onset, duration, and frequency of symptoms. Id.

22 Plaintiff argues that although the ALJ unequivocally stated he found him to be credible, the ALJ
23 did not include all of his alleged limitations in his RFC assessment, including the fact that he is forgetful,
24 does not get along with people, is easily angered, cannot lift more than 10 pounds, and cannot stand longer
25 than one hour at a time. The undersigned, however, finds the ALJ did not err here. First, in regard to both
26 the social functional limitations and the standing restrictions emphasized by plaintiff, as discussed above,
27 the ALJ did not err in finding only mild limitations in the area of social functioning or in rejecting the
28 specific standing restrictions asserted here. As to plaintiff's testimony concerning these limitations and

1 restrictions, the undersigned finds the ALJ properly credited it.

2 In his decision, the ALJ did state that he found plaintiff “to be a generally credible witness,” but he
3 then went on to note that plaintiff “consistently contended” he was able to work, specifically informing Dr.
4 Bremer of this. Tr. 24. The ALJ pointed out as well that plaintiff indicated to Dr. Ball that it was not him
5 who believed he was disabled, but his family. Id. As noted above, the ALJ then went on to evaluate and
6 discuss the overall evidence in the record, medical and otherwise, which he correctly found supported
7 these statements. Thus, the ALJ’s credibility determination must be seen in this light. That is, the
8 testimony and self-reports provided by plaintiff as a whole actually indicate a much greater ability to work.

9 As to plaintiff’s alleged lifting limitations, the ALJ actually credited them by restricting him to
10 only light work. At the hearing, in response to questioning from the ALJ, plaintiff testified that he
11 probably could lift and carry 10 pounds for six hours in an eight-hour day with normal breaks. Tr. 447-48.
12 This is in general consistent with the lifting and carrying requirements for light work. See 20 C.F.R. §
13 404.1576(b), § 416.976(b) (“Light work involves lifting no more than 20 pounds at a time with frequent
14 lifting or carrying of objects weighing up to 10 pounds.”). The undersigned further notes the record
15 reveals that plaintiff has both testified and reported he could lift and/or carry weights in significant excess
16 of the 10-pound lifting limitation being claimed, thereby indicating plaintiff himself believed he also could
17 perform the less than frequent 20 pound lifting requirement as well. See, e.g., Tr. 72, 446-47.

18 Although the ALJ did not indicate how he dealt specifically with plaintiff’s claim of forgetfulness,
19 once again, the ALJ’s emphasis on the fact that plaintiff himself admitted he did not see himself disabled
20 due to any mental impairment, and plaintiff’s own failure to point to any specific work-related limitations
21 resulting from this alleged impairment, again warrants a finding of no error here. The record shows that
22 plaintiff did complain of memory loss in late December 2000, and in mid-January and early February
23 2001. Tr. 221, 242, 262. In late February 2001, however, plaintiff reported having no memory loss. Tr.
24 189, 194. The late March 2004 mental status examination conducted by Dr. Ball found no evidence of
25 deficits in his memory as well. Tr. 290. An early March 2007 mental status examination performed by Dr.
26 Alvord also indicated plaintiff’s memory to be “generally within normal limits.” Tr. 379.

27 Indeed, no medical source in the record opined as to any memory-related functional limitations.
28 Nor did plaintiff testify or report that his forgetfulness interfered with his past jobs. Thus, the undersigned

1 finds that while the ALJ did consider plaintiff's alleged mental impairments, he correctly declined to adopt
2 any limitations due to forgetfulness. Lastly, plaintiff asserts there is no affirmative evidence in the record
3 that he was malingering. This, however, clearly is not true. As noted above, Dr. Alvord did find evidence
4 of malingering on psychological testing, stating specifically in relevant part:

5 Validity indicators . . . suggest Mr. Fogle's profile is invalid and therefore, not
6 interpretable. Specifically, he responded in a manner consistent with an
7 unsophisticated attempt to present himself in an unfavorable light or to highlight
8 psychiatric distress. At times similar response styles are considered to reflect a "cry for
9 help"; in this case, it is my clinical opinion that secondary gain issues inherent in an
10 evaluation of this nature motivated Mr. Fogle to exaggerate his level of distress.

11 Tr. 378 (emphasis added). The ALJ noted this finding in his decision (Tr. 21, 24), but appeared not to give
12 it much weight, because plaintiff's own reports indicated an ability to work. It seems clear, therefore, that
13 the ALJ found plaintiff credible only to the extent that his own testimony was consistent with the evidence
14 in the record as a whole, which itself was consistent with the ALJ's RFC assessment.

15 IV. Treatment of the Lay Witness Testimony at the First Hearing

16 Lay testimony regarding a claimant's symptoms "is competent evidence that an ALJ must take into
17 account," unless the ALJ "expressly determines to disregard such testimony and gives reasons germane to
18 each witness for doing so." Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001). An ALJ may discount lay
19 testimony if it conflicts with the medical evidence. Id.; Vincent v. Heckler, 739 F.2d 1393, 1395 (9th Cir.
20 1984) (proper for ALJ to discount lay testimony that conflicts with available medical evidence). In
21 rejecting lay testimony, the ALJ need not cite the specific record as long as "arguably germane reasons"
22 for dismissing the testimony are noted, even though the ALJ does "not clearly link his determination to
23 those reasons," and substantial evidence supports the ALJ's decision. Lewis, 236 F.3d at 512. The ALJ
24 also may "draw inferences logically flowing from the evidence." Sample, 694 F.2d at 642.

25 As noted above, plaintiff's mother appeared and began testifying at the first hearing, but was not
26 able to complete her testimony, because the ALJ continued the hearing so as to further develop the record.
27 Plaintiff argues the ALJ erred by not letting his mother complete her testimony, because she was unable to
28 attend the second hearing. But plaintiff fails to show how the ALJ at the first hearing could have known
his mother would not be able to attend the next hearing, either at the time of the first hearing or when the
next hearing was scheduled. Indeed, no mention of any inability on the part of plaintiff's mother to attend
the second hearing was made by plaintiff or his legal counsel at that hearing, nor was any objection raised

1 as to proceeding therewith without her. The undersigned thus finds no error on the part of the first ALJ in
2 continuing the first hearing as he did.

3 Plaintiff attaches to her reply brief a letter written by his mother, dated October 24, 2007, in which,
4 plaintiff asserts, she references information stated in the offer of proof his legal counsel made at the first
5 hearing. See (Dkt. #19, p. 3, Exhibit B); Tr. 399-400. The undersigned, however, declines to consider that
6 letter as evidence in this case, given that this is the first time it has been presented. The determination as
7 to whether to remand a case to the Commissioner on the basis of additional evidence submitted for the first
8 time to federal court is governed by 42 U.S.C. § 405(g). Under that statutory provision, to justify remand,
9 plaintiff must show that the additional evidence he submitted to this Court is both “new” and “material” to
10 determining his disability, and that he “had good cause for having failed to produce that evidence earlier.”
11 Mayes v. Massanari, 276 F.3d 453, 462 (9th Cir. 2001).

12 To be material, “the new evidence must bear ‘directly and substantially on the matter in dispute.’”
13 Id. (citation omitted). Plaintiff also must demonstrate a “reasonable possibility” the new evidence “would
14 have changed the outcome of the administrative hearing.” Id. (citation omitted). To demonstrate “good
15 cause,” plaintiff must show the new evidence “was unavailable earlier.” Id. at 463. However, the good
16 cause requirement will not be met by “merely obtaining a more favorable report once . . . [his] claim has
17 been denied.” Id.

18 While the letter from plaintiff’s mother arguably is material to this proceeding, plaintiff has failed
19 to show good cause for not presenting that the evidence contained therein earlier. Although the letter was
20 written after the second ALJ issued his decision, plaintiff does not explain why his mother could not have
21 presented her observations to the ALJ earlier, or, indeed, why she could not have presented the letter to the
22 Appeals Council, which issued its own decision several months after the date thereof. Thus, even though
23 the information contained in the letter may reference that in the offer of proof provided by plaintiff’s legal
24 counsel, plaintiff still has the burden of demonstrating good cause for not getting it into the administrative
25 record in a timely manner. He has failed to do so.

26 Also in his reply brief, plaintiff argues the ALJ failed to properly consider the record obtained from
27 his chiropractic treatment providers. Again, however, plaintiff did not present this argument in his
28 opening brief, and thus it is not appropriate to give it consideration here. As discussed above, furthermore,

1 progress notes from that treatment fail to show the presence of any specific work-related functional
2 limitations and reveal that by the time treatment ended in late January 2007, an 80% improvement in the
3 amount of pain experienced had occurred by plaintiff's own report.

4 V. The ALJ Did Not Err in Assessing Plaintiff's Residual Functional Capacity

5 If a disability determination "cannot be made on the basis of medical factors alone at step three of
6 the evaluation process," the ALJ must identify the claimant's "functional limitations and restrictions" and
7 assess his or her "remaining capacities for work-related activities." SSR 96-8p, 1996 WL 374184 *2. A
8 claimant's residual functional capacity ("RFC") assessment is used at step four to determine whether he or
9 she can do his or her past relevant work, and at step five to determine whether he or she can do other work.
10 Id. It thus is what the claimant "can still do despite his or her limitations." Id.

11 A claimant's residual functional capacity is the maximum amount of work the claimant is able to
12 perform based on all of the relevant evidence in the record. Id. However, a claimant's inability to work
13 must result from his or her "physical or mental impairment(s)." Id. Thus, the ALJ must consider only
14 those limitations and restrictions "attributable to medically determinable impairments." Id. In assessing a
15 claimant's RFC, the ALJ also is required to discuss why the claimant's "symptom-related functional
16 limitations and restrictions can or cannot reasonably be accepted as consistent with the medical or other
17 evidence." Id. at *7.

18 Here, the ALJ assessed plaintiff with the following residual functional capacity:

19 **... the claimant has the residual functional capacity to perform light work except**
20 **that he is precluded from climbing ladders, ropes, and scaffolds; other posturals**
21 **are limited to occasional; no concentrated exposure to hazards such as machinery**
22 **and heights; only occasional interaction with coworkers, supervisors, and the**
23 **public; He is further limited to simple routine and repetitive tasks not performed**
in a fast production paced environment, involving only simple work-related
decisions and few work place changes; and, finally, [the claimant] is limited in
writing and reading at the 7th grade level and limited in math at the 3rd grade level.
...

24 Tr. 23 (emphasis in original). Plaintiff argues the ALJ's RFC assessment is simply conclusory, somewhat
25 speculative and contains insufficient rationale or reference to supporting evidence. The undersigned finds
26 this claim though to be wholly without merit. While the above assessment is provided at the beginning of
27 the section of the ALJ's decision dealing with this issue, the ALJ does go on to set forth his discussion of
28 the evidence in the record and analysis thereof to support his findings. See Tr. 23-25. Accordingly, the ALJ

1 adequately set forth his reasons for assessing plaintiff with the residual functional capacity he did, and the
2 undersigned finds nothing speculative or conclusory about it.

3 Plaintiff argues the ALJ cited no specific examples in the record that would indicate he could stand
4 and walk for more than four hours in an eight-hour workday or more than one hour at a time. But the ALJ
5 set forth a detailed summary of the evidence in the record concerning plaintiff's physical impairments and
6 limitations, including both his own testimony, which, as discussed above, supports a finding that plaintiff
7 is capable of standing and/or walking for at least six hours a day, with no need to discontinue doing so
8 after only one hour. See Tr. 20-22, 24-25. The undersigned also rejects plaintiff's contention that the
9 evidence in the record demonstrates that he is unable to perform full-time work on a regular and ongoing
10 basis, and that the ALJ thus erred in not including this limitation in his RFC assessment.

11 Residual functional capacity ordinarily is the "maximum remaining ability to do sustained work
12 activities in an ordinary work setting on a **regular and continuing basis**," meaning "8 hours a day, for 5
13 days a week, or an equivalent work schedule." SSR 96-8p, 1996 WL 374184 *2 (emphasis in original).
14 The RFC assessment, therefore, "must include a discussion of the individual's abilities on that basis." Id.
15 (emphasis added). However, the ALJ need not make a specific finding as to a claimant's ability to sustain
16 employment, but rather such a finding may be subsumed within the residual functional capacity
17 assessment itself. See Frank v. Barnhart, 326 F.3d 618, 621 (5th Cir. 2003) (ALJ was not required to make
18 express determination as to whether work could be maintained on sustained basis, as nothing in record
19 suggested claimant was unable to do so); Perez v. Barnhart, 415 F.3d 457, 466 (5th Cir. 2005) (claimant
20 failed to offer any evidence his condition waxed and waned in intensity such that ability to maintain work
21 was not adequately taken into account in his RFC determination).

22 Plaintiff argues all of his work has been part-time, did not rise above the substantial gainful activity
23 level and he lost several jobs do to impairments in his social functioning. The substantial evidence in the
24 record, however, indicates a greater ability on the part of plaintiff to do work full-time. For example, in
25 late March 2004, plaintiff told Dr. Ball he thought it was "wrong" that his family wanted him to apply for
26 disability benefits on the basis of mental impairment. Tr. 287. He also told Dr. Ball he was able to get the
27 dishes done at work in a timely manner. Tr. 289. In addition, plaintiff reported that while he has had "lots
28 of temporary work," he was able to maintain "consistent employment over the last 15 years." Id. Further,

1 although he reported that his most recent job was only part-time at 25 hours per week, he expressly stated
2 that he would “rather have a fulltime job,” but there was “nothing open.” Id.

3 As discussed above, plaintiff has reported standing on his feet at his dishwasher job for up to nine
4 to ten hours day. Tr. 333. Although he also reported he did so for only three days a week (Id.), he told Dr.
5 Bhaskar as well that he stood “almost seven hours a day at his work,” with no indication he did so only on
6 a part-time basis. Tr. 293. When asked about “hurdles to finding or maintaining employment,” plaintiff
7 told Dr. Alvord not that he physically or mentally was unable to work, but that while “sometimes” he got
8 “frustrated and quit,” he “mostly” liked “to move around” and do his “own thing.” Tr. 375. As discussed
9 above, furthermore, plaintiff himself testified at the second hearing that he essentially he could perform at
10 least at the light work level for the entire day, without any indication that such could not be maintained for
11 the entire workweek. See Tr. 446-48. The record overall thus does not support a limitation to being able to
12 perform only part-time work.

13 Plaintiff argues the ALJ erred in not including in his residual functional capacity assessment the
14 social functioning limitations discussed herein. However, also as discussed above, the substantial
15 evidence in the record supports the ALJ’s determination that plaintiff had no more than a mild impairment
16 in that area. The ALJ, furthermore, did take into account plaintiff’s learning disorder, limiting him to
17 being able to read and write at the 7th grade level and do math only at the 3rd grade level, which largely is
18 in line with the academic testing results obtained by Drs. Alvord and Bremer. See Tr. 379, 387. Plaintiff
19 points to no further restrictions stemming therefrom, including any supported by the substantial evidence
20 in the record, which the ALJ should have included in his RFC assessment.

21 VI. The ALJ Did Not Improperly Disregard the Vocational Expert’s Testimony

22 If a claimant cannot perform his or her past relevant work, at step five of the disability evaluation
23 process the ALJ must show there are a significant number of jobs in the national economy the claimant is
24 able to do. Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20 C.F.R. § 404.1520(d), (e), §
25 416.920(d), (e). The ALJ can do this through the testimony of a vocational expert or by reference to the
26 Commissioner’s Medical-Vocational Guidelines (the “Grids”). Tackett, 180 F.3d at 1100-1101; Osenbrock
27 v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).

28 An ALJ’s findings will be upheld if the weight of the medical evidence supports the hypothetical

1 posed by the ALJ. Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987); Gallant v. Heckler, 753 F.2d
2 1450, 1456 (9th Cir. 1984). The vocational expert's testimony therefore must be reliable in light of the
3 medical evidence to qualify as substantial evidence. Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988).
4 Accordingly, the ALJ's description of the claimant's disability "must be accurate, detailed, and supported
5 by the medical record." Embrey, 849 F.2d at 422 (citations omitted). The ALJ, however, may omit from
6 that description those limitations he or she finds do not exist. Rollins v. Massanari, 261 F.3d 853, 857 (9th
7 Cir. 2001).

8 At the second hearing, the ALJ posed a hypothetical question containing limitations substantially
9 similar to those he included in his assessment of plaintiff's residual functional capacity. Tr. 474. In
10 response to that hypothetical question, the vocational expert testified there were other jobs a hypothetical
11 individual with those limitations could do. Tr. 472-74. Based on the vocational expert's testimony, the
12 ALJ found plaintiff to be capable of performing other jobs existing in significant numbers in the national
13 economy. Tr. 26-27.

14 Plaintiff argues the ALJ erred by not including in the hypothetical question he posed any additional
15 limitation with respect to standing, a sit/stand option, forgetfulness, dizziness and light-headedness. But as
16 discussed above, the ALJ did not err in declining to adopt such further limitations. Plaintiff also contends
17 the ALJ erred in not including any occasional limitations in the areas of concentration, persistence or pace
18 and maintaining emotional behavior at work. However, plaintiff cites to no specific evidence in the record
19 to indicate further limitations were warranted. As discussed above, the ALJ properly found plaintiff had at
20 most a mild impairment in his social functioning.

21 To the extent an "occasional" limitation in the areas of concentration, persistence or pace could be
22 said to be warranted, furthermore, the undersigned finds the ALJ's residual functional capacity assessment
23 adequately accounted for that. Specifically, the ALJ limited plaintiff to only "simple routine and repetitive
24 tasks not performed in a fast production paced environment, involving only simple work-related decisions
25 and few work place changes." Tr. 23. Indeed, the substantial evidence in the record indicates his abilities
26 in those areas were not even that limited. See, e.g., Tr. 289, 291, 294, 311, 371, 375. For example, in late
27 March 2004, plaintiff reported that he could "concentrate the whole time at work," that his mind did not
28 wander and that he was able to "play video games at 5-6 hours at a time." Tr. 289. He also reported that

1 he would go to the woods and meditate for three to four hours “by thinking and reading his Bible.” Tr.
2 294. In early March 2007, plaintiff denied “any difficulty persisting at tasks or pacing himself with chores
3 or work activities.” Tr. 375. As plaintiff related to Dr. Alvord at the time:

4 . . . He provided an example of a rosary necklace he had constructed with included
5 numerous wooden beads, strung on small wire links. The work was intricate and
considered quite labor intensive. . . .

6 Id. In addition, when questioned, plaintiff indicated he had “no difficulty constructing an entire necklace
7 in a couple of sittings.” Id.

8 Plaintiff further argues the definitions of the jobs identified by the vocational expert contained in
9 the Dictionary of Occupational Titles (“DOT”), require the individual performing those jobs to have more
10 than occasional contact with co-workers and supervisors and to perform according to preset standards. A
11 review of the DOT’s descriptions of those jobs, however, in fact show that dealing with people is not a
12 significant vocational requirement. See DOT 520.687-046 (Mexican food maker); DOT 520.637-066
13 (blending tank tender helper); DOT 524.687-022 (bakery worker); DOT 555.687-010 (scale operator); see
14 also Tr. 472-75. As such, the undersigned finds the ALJ’s limitation to only occasional contact with co-
15 workers and supervisors to be adequate.

16 With respect to the issue of preset pace standards, plaintiff points to nothing in the descriptions of
17 the above jobs contained in the DOT that mandate a preset pace standard, let alone describe what specific
18 standard is required. Nor does the undersigned find any such standard set forth therein. Accordingly, this
19 assertion too is entirely without merit. It is true that the vocational expert testified that the Mexican food
20 maker job may at times require a faster pace (Tr. 477), but this would still leave the other three jobs noted
21 above. The vocational expert also testified that there would be a pace and production level designated for
22 the blending tank tender helper job, but that it would not be considered fast-paced. (Tr. 478). As such, the
23 undersigned finds the ALJ did not err in determining there were other jobs existing in significant numbers
24 in the national economy plaintiff could perform.

25 CONCLUSION

26 Based on the foregoing discussion, the Court should find the ALJ properly concluded plaintiff was
27 not disabled, and should affirm the ALJ’s decision.

28 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 72(b),

1 the parties shall have ten (10) days from service of this Report and Recommendation to file written
2 objections thereto. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
3 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit
4 imposed by Fed. R. Civ. P. 72(b), the clerk is directed set this matter for consideration on **May 15, 2009**,
5 as noted in the caption.

6 DATED this 17th day of April, 2009.

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9 Karen L. Strombom
10 United States Magistrate Judge
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